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No._____

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner,

v.

Merit System Protection Board,

Respondent.

APPENDICES

VOLUME II OF V VOLUMES

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

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APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-3256

RICHARD C. SOEHNGEN,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: September 26, 1991

Before ARCHER, MICHEL, and PLAGER, Circuit Judges.

PER CURIAM.

DECISION

Richard C. Soehngen received a two year Presidential Management Intern (PMI) appointment. His appointment was later extended one year. When the appointment expired, the Office of Personnel Management (OPM) did not further extend Soehngen's employment. Soehngen appealed to the Merit Systems Protection Board (MSPB or Board). The MSPB concluded that the decision to allow a term appointment to expire was not an appealable adverse action within the Board's jurisdiction. We affirm.

OPINION

Soehngen argues that he had a reasonable expectation of continued employment, beyond the termination date of his PMI appointment. Soehngen concludes that OPM's failure to continue his employment was an adverse action appealable to the MSPB.

It is true that the OPM directions and regulations cited by Soehngen are not crystal clear in expressing their intent or application. However, the interpretation urged by Soehngen would, regarding MSPB jurisdiction, treat an extension of a PMI appointment for a third year as though the extension itself created a permanent employment position. The record demonstrates that the MSPB has consistently rejected this argument. See also 5 U.S.C. § 7512 (1988); 5 C.F.R. § 752.401(b) (11) (1991).

The legal standard by which the Federal Circuit reviews decisions of the MSPB is that a decision must be affirmed unless it is found to be:

1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

2) obtained without procedures required by law, rule or regulation having been followed; or

3) unsupported by substantial evidence.

See 5 U.S.C. § 7703. In light of this standard of review and of the facts in this case, we have no doubt that the Board's decision must be and is hereby affirmed.

91-3256

United States Court of Appeals for the Federal Circuit

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: SEPT. 26 1991

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

SOEHNGEN V MSPB, 91-3256
(MSPB - DC07529010604)

APPENDIX B-1

UNITED STATES COURT OR APPEALS
FOR THE FEDERAL CIRCUIT

Richard C. Soehngen, Petitioner
v
Department of Justice, Respondent
Petitioner No. 91-3256

Informal Brief of Petitioner

1. Has the petitioner ever had another case in this court? NO In a United States District Court? NO In the Equal Employment Opportunity Commission? NO If so, identify each case.

2. Did the MSPB or the Arbitrator incorrectly decide or fail to take into account any facts? YES If so, what facts?

Facts regarding the reasonable expectation that there would be continued employment and that as a preference eligible veteran the board has jurisdiction.

The February 28, 1991, MSPB Opinion and Order at page 6, erred in fact and in law when it says the dispositive issue is, "whether the agency's action in releasing the appellant from employment upon the termination of his temporary PMI appointment is an action that is appealable to the Board." Consequently, the MSPB erred when it denied jurisdiction and when it denied a hearing on jurisdiction.

Petitioner's informal brief argues thusly:

I. THE ADMINISTRATIVE JUDGE AND THE MSPB FAILED TO CONSIDER THE FACTS AND LAW WHICH DEMONSTRATED PETITIONER'S

ENTITLEMENT TO PROCEDURAL DUE PROCESS. PP. 1-6

A. The FPM (Federal Personnel Manual) Provisions PP. 6-7
B. Conduct of Agency Officials PP. 8-12
C. Personnel Forms PP. 12-14

II. AS A PREFERENCE ELIGIBLE, PETITIONER STATUTORILY WAS ENTITLED TO ADVERSE ACTION PROCEDURES. PP. 14-17

III. PETITIONER IS ENTITLED TO A HEARING BECAUSE HIS APPEAL RAISED A NON-FRIVOLOUS ALLEGATION OF JURISDICTION PP. 17-19

IV. THE FACT-FINDER'S REPORT SHOULD BE ADMITTED INTO THE RECORD BECAUSE IT IS DISPOSITIVE ON THE ISSUES BEFORE THE BOARD. PP. 19-22

4. Did the MSPB or the Arbitrator fail to consider important grounds for relief? YES If so, what grounds?

Please refer to petitioner's informal brief attached hereto.

5. Are there other reasons why the MSPB's or the Arbitrator's decision was wrong? YES If so, what reasons?

Please refer to petitioner's informal brief attached hereto.

6. What action (relief) do you want the court to take in this case?

To find that the petitioner is entitled to a hearing on the merits as to petitioner's termination or, alternatively, to remand and

direct that the MSPB hold a fact-finding hearing to decide jurisdiction.

7. Do you want to argue before the court in person? YES
What are the reasons why argument will aid the court?

The case is factually complex and involves novel legal issues. Oral argument will assist the court in focusing upon the salient facts which, in turn, direct the law to be involved.

Date Petitioner's Signature

ARGUMENT

I. THE ADMINISTRATIVE JUDGE AND THE MSPB FAILED TO CONSIDER THE FACTS AND LAW WHICH DEMONSTRATED PETITIONER'S ENTITLEMENT TO PROCEDURAL DUE PROCESS

The central basis for MSPB's opinion and order, hereto attached at Appendix A, that the MSPB lacked jurisdiction to hear petitioner's appeal was the erroneous holding that the termination of Petitioner's PMI appointment was not an "otherwise appealable" action. However, this holding errs as to the unique nature of petitioner's appointment under the PMI program. The PMI program, as evidenced by regulation, memoranda, oral representations and behavior created a reasonable expectation of continued employment. The MSPB ignores the settled law that such an expectation created a Fifth Amendment property interest in employment, which in turn, entitled petitioner to procedural due process requirements such as notice and a hearing upon his termination from employment.

For the MSPB to hold, as a mater of law, that it had no jurisdiction to entertain petitioner's claims erred in that the administrative judge's declination of jurisdiction was not supported by substantial evidence on the record. The erroneous holding on the conclusionary, or ultimate, fact resulted in misapplication of the law.

An individual alleging that he or she has been deprived of his constitutional rights to notice and a hearing must first demonstrate that he had a legitimate entitlement to his job sufficient to constitute a protected property interest under the Fifth or Fourteenth Amendment. See Paige v. Harris, 584 F.2d 178, 181 (7th Cir. 1978). When the decision to discharge a public employee results in a deprivation of property interest, such as termination of employment, due process requires a notice of the charges and a type of hearing. Id. at 181 See also Arnett v. Kennedy, 416 U.S 134 (1974). In the federal employment sphere, these due process

concerns have been codified in the adverse action procedures found in 5 U.S.C. § 7511 et seq.

It has long been established that an employee's reliance upon assurances from an employer that his employment will continue may give rise to an expectation of continued employment, which invokes due process protections. For example in Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court considered whether a college professor who relied on policies and procedures articulated by the college could establish that he had an expectation of continued employment even though he had no formal tenure agreement with the college. The Court held that a property interest in employment may be established by the existence of rules and understandings which may justify as legitimate a claim of entitlement to continued employment, and accordingly, invoke due process protections. Id. at 602.

Similarly, in Aston v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979), the court determined that a letter given to an employee when he was initially hired at the FBI, and various provisions of the FBI Handbook, created an expectation of continued employment that gave rise to due process rights. Thus, the court held that even through the employee's job position was "expected by law from the competitive Civil Service the employee had a property right in employment which entitled him to notice and a hearing upon termination. Id. at 930. The court specifically note that since the dimensions of a property interest are defined by the rules and understandings which give rise to it, and since the agency's promise was by its terms contingent only on "satisfactory work," the employee could properly be dismissed only for failing to perform his duties satisfactorily and without prejudice to the achievement of the agency's mission. Id.

In Page v. Harris, 584 F.2d 178 (7th Cir. 1978), the court found that the handbook published by the Department of Housing and Urban Development provided rules and understandings sufficient to create a legitimate claim of entitlement to continued employment and a due process property interest sufficient to enable the employee to a hearing on which he could challenge the basis for his non-retention. See also Tamura v. FAA, 675 F. Supp. 1221,

1226 (D. Hawaii 1987) (court found that agency created a "situation instinct with obligation," in its relationship with employee sufficient to create a property interest protected by due process clause).

Moreover, the MSPB has recognized that the due process principles set forth by the Supreme Court in Perry and its progeny extend to preference eligible in MSPB appeals who establish a reasonable expectation of continued employment. For example in Shelton v. Federal Deposit Insurance Corp., 38 M.S.P.R. 303 (1988), the MSPB found that a preference eligible is entitled to notice and a hearing to challenge an adverse action where the record establishes that the individual had a reasonable expectation of continued employment. In that case, the administrative judge found that the appellant met the statutory definition of "employee" under 5 U.S.C. § 7511 (a)(1)(B) because he established that he was a preference eligible employee who had completed one year of current continual service in the same or similar position. The administrative judge further found that the appellant was the subject of an adverse action, i.e., removal, which was appealable to the Board. Id. at 305. In reaching this holding, the administrative judge relied upon Roden v. Tennessee Valley Authority, 25 M.S.P.R. 363 (1984) and Stevens v. Tennessee Valley Authority, 687 F.2d 158 (6th Cir. 1982), for the proposition that the MSPB must look at the true nature of an employee's appointment, 38 M.S.P.R. at 306.

The Board has clearly indicated that in situations where an employee is able to demonstrate a reasonable expectation of continued employment, a property interest may be created and procedural due process rights may attach.[1]

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[1] Far from supporting dismissal of petitioner's appeal in this case as the Administrative Judge Bogle apparently found in this case, Shelton stands for the proposition that a reasonable expectation of employment, particularly construed in the context of veteran's preference legislation, may enable an employee to obtain appeal rights to the board. Judge Bogle also cites Meade v. Federal Deposit Insurance Corp., 41 M.S.P.R. 191 (1989), in support of the proposition that petitioner was not entitled

Furthermore, the fact that a position may be termed "temporary" does not mean that an employee may never demonstrate a reasonable expectation of continued employment. For example, in Stevens v. Tennessee Valley Authority, 687 F.2d 158 (6th Cir. 1982), the court conducted an analysis of the meaning of the term "temporary position" in the context of the Vietnam Era Veterans Readjustment Act, 38 U.S. C. § 2021. The court noted that while an employer is free to create both temporary and non-temporary positions, it cannot do so simply by designating a particular position as temporary, if in fact, the characteristics of that position make it non-temporary. Thus, the court found that in determining whether a particular position is temporary, the trier of fact must examine all of the relevant characteristics of the position, not simply the designation given to it by the employer. 687 F.2d at 161. Significantly, the court also stressed that the proper test to determine whether a position is temporary is whether there was a reasonable expectation, in light of all the circumstances of employment, that the employment would not continue for a significant or indefinite period. Id. at 161.

In light of these clear legal principles, petitioner's reasonable expectation of continued employment is clearly established by a myriad of factors, which were presented to and completely ignored by the administrative judge, including the applicable provisions regarding PMI appointments in the Federal Personnel Manual ("FPM"), the conduct of the agency officials regarding the issues of the performance work plan and the training provided to petitioner, ad the unique nature of petitioner's appointment as established by the personnel action forms utilized to effect his appointment.

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to due process protections. However, Meade is not dispositive in this action because in the case, the board strictly followed the decision on the merits of Shelton, which did not involve the principles articulated in Roden and Stevens concerning the reasonable expectation of employment.

A. The Federal Personnel Manual Provisions

Contrary to the administrative judge's interpretation of the FPM provisions at issue in this case, the language of these provisions suggests a reasonable expectation of continued employment contingent upon satisfactory job performance, similar to that relied upon by the court in Ashton v. Civiletti.[2] Specifically, Chapter 362 of the FPM provides that an employee in the PMI program has an expectation of conversion as long as the employee has performed at the agency in a satisfactory manner. See FPM Chapter 362, Sections 2-7 and 2-8, attached hereto as Appendix B. Thus, as in Ashton, a PMI such as petitioner in this case, who received "Fully Successful" performance appraisals throughout his PMI could reasonable expect to be converted to career status.[3] Indeed, Section 2-7, FPM, chapter 362 requires that PMI employees either be converted or terminated. There is no provision for PMI employee to lose employment by expiration of term of employment, by lapse or passage of time, or any other such way other than by termination.

It is undisputed that throughout his tenure as a PMI, petitioner received "Fully Successful" performance appraisals. Thus, under the applicable FPM provisions, petitioner had every reason to believe that he would be converted to career status, and thus, that his employment would continue beyond the term of his PMI appointment.[4]

The Federal Personnel Manual, at Section 2-8 suggests that there is no such provision for an employee in the PMI program to expire, or have his status lapse by expiration of term. Indeed, the FPM defines "expire and termination" interchangeably, and it

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[2] SEE ASTON, 613 F.2d at 929-30.

[3] The Agency has not raised any issue concerning petitioner's performance, misconduct, unsuitability, or inefficiency as reasons justifying his termination from employment.

[4] Petitioner's request for discovery as to the number of PMI's who did convert was denied.

provides certain actions for terminations or expirations. All of this clearly indicates that the MSPB erred when it essentially finds PMI appointments to be temporary.[5]

B. Conduct of Agency Officials

In a letter to Petitioner dated June 10, 1988, in which Judge Robie offered Petitioner the position of program analyst in the CAU of the Office of Chief Immigration Judge, Judge Robie premised petitioner's job offer on the notion that it would lead to a career appointment and advancement within the agency. Specifically, Judge Robie stated that:

> You can expect to be promoted to GS-11/1 when you become eligible (PMI entry dated on duty date, August 23, 1987). Longer term career development potential to the GS-12 (at internship

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[5] Federal Personnel Manual, Chapter 362, § 2-8; "The Schedule A appointment of a Presidential Management Intern expires at the end of the two-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see Section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies; policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. For preference eligible as defined in 5 U.S. C. 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C. § 7513. An agency may not remove an intern based on a prohibited personnel practice listed in 5 U.S.C. § 2302. Termination actions should be consistent with the objectives of the program to select, develop and retain for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to the Presidential Management Intern Program Office of the decision to terminate." (Emphasis Added).

conclusion) and GS-13 levels based on job performance are associated with this position at ACU.

This letter establishes the legitimate expectation that petitioner would have continued employment in the Federal Government as long as his performance was successful, especially given the fact that throughout the petitioner's service in the PMI program, his performance was rated at least fully successful by agency officials. See Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).

Judge Robie's letter comported with the letter issued by Director, Presidential Management Intern Program, Office of Personnel Management, on 30 March 1987. In that letter, a copy which is attached hereto as Appendix C, it is provided that the petitioner will be eligible for conversion, without further competition, to the career service upon successful performance of petitioner's internship. A fair reading of this letter, coupled with FPM, Chapter 362, supports that eligibility turns upon satisfactory work, and agency staffing/budgetary provisions. If no further competition is required to convert, then it seems arguably obvious that such tenure as is inherent in the PMI program is not that tenure which expires by the very term, letter and authority of appointment. The agency's and the Merit System Protection Board's finding of petitioner's appointment as having a definite date of expiration cannot be reconciled with the terms of this letter.

Other actions on the part of agency officials justify petitioner's reasonable expectation of continued employment. For example, the agency approved a performance work plan for him on June 20, 1990. This plan covered the period of June 20, 1990 through March 31, 1991 — 7 months past the date when the third and final year of petitioner's PMI appointment was to expire.

In February, 1990, the agency finally approved nine training courses for the petitioner to attend. These courses were not integrated into a PMI Individual Development Plan. Between February and August of 1990, petitioner completed seven of the nine courses and the two remaining courses were canceled by

OPM. in fact, petitioner completed his last training course on August 22, 1990 — after August 14, 1990, the date on which he was advised that he would not be converted to career status and just before Petitioner was terminated (August 245, 1990) with only ten days notice.

In May of 1989, the request for PMI extension was forwarded to OPM some eight months before the Petitioner finally received the training plan. Chapter 362-6 of the Federal Personnel Manual (FPM) requires that an Individual Development Plan for the intern during the third year, containing specific assignments and learning objectives, must accompany the extension request.

FPM, Chapter 362-6 states that the Agency must provide certain information when requesting an extension. It is undisputed that the Agency did not submit the required information when the PMI extension request was submitted.

Assuming arguendo, that the Petitioner's Performance Work Plan, based on his job description, ad receive on June 20, 1990[6] and the extensive list of training courses were all designed to evaluate the Petitioner's work performance and to prepare the Petitioner, during the third year extension period, for conversion, then it follows that for the Petitioner not to be rated against the performance work plan an the completion of the training, conclusively demonstrates that DOJ was not interested in providing another job performance rating of, at least, fully satisfactory. To do so would have placed DOJ in the position of justifying a non-

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[6] The Petitioner's Performance Work Plan was received only after he formally filed a grievance to force management to rate his work performance during the next rating cycle, part of which fell within the third year extension period. It is customary and normal for employee's to receive a performance rating based upon performance work plans. A performance rating was never received during the above referenced rating cycle nor during entire third year extension.

conversion when the Petitioner had successfully completed the internship by any measurable standard.[7]

In addition, it is clear that an adverse action did occur when the agency chose to ignore its responsibilities under the PMI program and chose to let the internship expire by extending it a their year followed by no periodic performance review, no counseling, and no notice of adverse action as required in Section 2-8 of Chapter 362 of the FPM.[8] Indeed, as set forth supra, at footnote 5 and accompanying test, there in no distinction drawn in the FPM between "expire" and "terminate". The agency's actions in this regard were arbitrary, capricious, abusive of authority, and without basis in law.

Based on these facts, it is unreasonable to conclude that petitioner should have considered himself to be in a temporary position as the administrative judge suggested in her initial decision, especially given the fact that he provided services to the agency under a performance work plan and training schedule which remained in effect past the time when he was advised about his termination. The Petitioner also received a job performance rating in May of 1989 covering an eight month period (August, 12988 through March 31, 1989). This rating stated that the Petitioner was

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[7] Federal Personnel Manual Letter 362-3, January 18, 1983, paragraph 10, Provider, inter alia, that PMI employees held over for a third year "assuming satisfactory performance, . . . will be converted to career appointments." By logic, formal assessment of a PMI's performance must be made before a decision to convert to career status can be made. Such OPM mandated personnel procedures cannot be reconciled with the agency's and the MSPB's conclusion that no appraisal be made, that a PMI may be "terminated" solely by passage of time. Appendix D attached hereto contains a copy of FPM Letter 362-3.

[8] "Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to the Presidential Management Intern Program office of the decision to terminate."

performing in a fully satisfactory manner thus successfully meeting the requirements for conversion.

C. Personnel Forms

The permanent nature of petitioner's appointment is also established by the paperwork documenting petitioner's admission into the PMI program. The Notification of Personnel Action Form indicating petitioner's hire into his initial PMI appointment with the Department of the Army states that:

> APPOINTMENT IN NTE TWO YEARS, UPON SATISFACTORY COMPLETION OF INTERNSHIP, YOU MAY BE NON-COMPETITIVELY CONVERTED TO CAREER OR CAREER-CONDITIONAL APPOINTMENT. IF YOUR PERFORMANCE IS NOT SATISFACTORY OR IF YOUR FAIL TO SATISFACTORILY COMPLETE INTERNSHIP, EMPLOYMENT WILL BE TERMINATED. (Emphasis Added)

The notification form clearly created an expectation that, if petitioner satisfactorily completed the internship, he would be non-competitively converted to a career or career-conditional appointment.

Moreover, both the Request for Personnel Action Form admitting petitioner to the PMI program and the Request for Personnel Action reflecting his initial employment with DOJ created a reasonable expectation of continued employment. On both forms, the code under Block 18-A, NOAC, is 170. Pursuant to the Department of Justice Personnel Guide to Processing Personnel Actions, FPM Supplement 296-33, Chapter 11, appointment as a Schedule A employee with a code of 170 is characterized as an excepted service without time limitation, as contrasted with the code of 171, which is characterized as a temporary appointment with a "not to exceed date" limiting the

appointment. Significantly, on both of petitioner's requests, there is no reference to any "not to exceed date" limiting the appointment. Significantly, on both of petitioner's requests, there is no reference to any "not to exceed date" in Block 18-8, reflecting the nature of appointment.

Thus, by its very nature, a PMI appointment is not temporary. For the agency and the MSPB to so argue, ignores this distinction set forth in the agency's own well-established personnel process and violates its own very specific rules to follow.

Finally, on both the Request for Personnel Action form reflecting petitioner's appointment to the PMI program an August 1987 and the Notification of Personnel Action form indicating petitioner's hire into the Executive Office for Immigration Review, petitioner's tenure status is noted as Group 2. Group 2 is defined to include employees who serve under conditional appointments which automatically lead to full tenure after a prescribed time and "without further qualification."

Under FPM Supplement 296-33, excepted service employee appointments in tenure Group 2 are defined as "employees who are serving a trial period and employees whose tenure is equivalent to career-conditional tenure and the competitive service in agencies that use that type of appointment system." Thus, petitioner's designation as a "Group 2" employee meant that he was in a category of employees whose conditional appointment automatically led to permanent career conversion.

As demonstrated above, the facts in this case clearly establish that the petitioner had, at the very least, a reasonable expectation that he would be converted to a career position at the end of the third year of his PMI appointment. This reasonably founded belief, which is amply demonstrated by the evidence developed in the proceedings before the administrative judge and the MSPB, created a property interest in employment. Accordingly, under the Supreme Court's decision in Perry, and the other cases discussed herein, petitioner was entitled to the procedural due process protections of notice and a hearing when the agency decided to terminate his employment. The

administrative judge's and the MSPB's findings to the contrary are erroneous and should be reversed.

II. AS A PREFERENCE ELIGIBLE, PETITIONER WAS ENTITLED TO ADVERSE ACTION PROCEDURES

Even if the Board could find that petitioner, in his status as a PMI employee, did not have a reasonable expectation of continued employment which entitled him to procedural due process, he still was entitled him to procedural due process, he still was entitled to notice and a hearing in the facts of this case. As a special compensatory disabled preference eligible veteran, petitioner would normally be entitled to notice and a gearing for any removal action initiated against him. See 5 U.S.C. §§ 5711 and 7513.

Preliminary, petitioner was accorded preference eligible, combat disabled veteran's rights when petitioner competed for and was accepted, into the PMI program. See March 30, 1987 OPM Letter cited previously, and found at Appendix C. It is a paradox for the agency and the Merit System Protection Board to now argue that those preference eligible veteran's rights do not now attach to Petitioner.

Section 2-8 of Chapter 362 FPM, which contains regulations pertaining to PMI appointments provides:

> "The Schedule A appointment of a Presidential Management Intern expires at the end of the two-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see Section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. For preference eligible as defined in 5 U.S.C. § 7511 (a)(1)(B),

> removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C. § 4303 (e) or those relating to adverse actions provided at 5 U.S.C. § 7513. An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C.
>
> Termination actions should be consistent with the objectives of the program to select, develop and retain for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedure should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to the Presidential Management Intern Program Office of the decision to terminate." (Emphasis Added)

In this case, as demonstrated above, petitioner's performance as a PMI was fully satisfactory. Thus, under the clear language of the FPM, petitioner was entitled to adverse action procedures, including notice and a hearing, in connection with the termination of his employment.

The administrative judge and the MSPB dismissed petitioner's clear entitlement to notice and a hearing on the merits of the action taken against him by the agency in this case by holding that the intent of these particular provisions was only to grant appeal rights to preference eligible who were terminated from PMI appointments because or poor performance or misconduct prior to their natural expiration. However, this rather restrictive reading of the FPM provisions makes no sense in light of the clear language to the contrary. There would be no need whatsoever for adverse action rights and procedures is all an employing agency need do to rid itself of an employee would be to not rate or review the employee — essentially a job termination for want of a performance appraisal.

Pursuant to Section 2-8 of FPM Chapter 362, the Schedule A appointment of a PMI expires at the end of the two year internship period. If the agency neither converts nor extends the internship, the PMI appointment "terminates". This termination of appointment is, petitioner submits, equivalent to a removal action, which entitles individuals such as petitioner who are preference eligible to notice and a hearing under 5 U.S.C. § 7513.[9]

Accordingly, the administrative judge erred in finding that adverse action procedures were not required in this case by virtue of petitioner's status as a preference eligible.

Moreover, the agency's failure to follow the requirements of § 7513 in this case requires reversal of petitioner's termination. See Blalock v. Department of Agriculture, 28 M.S.P.R. 17 (1985) aff'd, 793 F.2d 284 (Fed. Cir. 1986), cert. denied, 479 U.S. 1043 (1987). In Blalock, the Board held that preference eligible employees have a right to an appeal from removal and that the absence of the procedures required by 5 U.S.C. § 7701 (c)(2)(A).

As argued above, petitioner, a special compensatory disabled preference eligible veteran, was entitled to be provided with the procedures required by 5 U.S.C. § 7513. The agency's failure to extend the benefit of such procedures to him constitutes harmful, reversible error.

III. PETITIONER IS ENTITLED TO A HEARING BECAUSE HIS APPEAL RAISED A NON-FRIVOLOUS ALLEGATION OF JURISDICTION

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[9] 5 U.S.C. § 7513: provides inter alia, "(1) at least 30 days written notice . . .; (2) A reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answers; (3) be represented by an attorney or other representative; and (4) a written decision ant the specific reasons therefore at the earliest practicable date."

Even if the factual record is not sufficiently developed to determine whether the Board has jurisdiction to hear petitioner's case, the administrative judge and the MSPB erred in dismissing the appeal because petitioner raised a non-frivolous allegation of jurisdiction, which entitled him to a hearing on that issue. Burgess v. MSPB, 758 F.2d 641, 643 (Fed. Cir. 1985).[10] Bagge v. Department of the Navy, 38 M.S.P.R. 326 (1988). See Spiegle v. Department of the Army, 2 M.S.P.B. 307 (1980). Petitioner as consistently argued that he was entitled to a hearing because he had a reasonable expectation of continued employment, which gives rise to a Fifth Amendment property interest and attendant procedural due process rights. As demonstrated above, the legal issues on this point are well established an have been recognized by the Board itself. E.g., Shelton v. Federal Deposit Insurance Corp., 38 M.S.P.R. at 307.

In addition, one of the issues that petitioner raised in his appeal was the fact that the intent of the PMI program and OPM is to convert all satisfactory performing PMI appointments to career positions. Petitioner sought to obtain additional evidence of this crucial point by propounding discovery requests to OPM.

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[10] In Burgess, the Federal Circuit held that an administrative judge failed to give an appellant adequate notice of what was required to establish Board jurisdiction prior to dismissing a appeal on jurisdictional grounds. Specifically, the court found that the show cause order issued by the administrative judge failed to adequately appraise the appellant that she would be required to come forward with evidence of a non-frivolous allegation that her resignation from employment was not voluntary in order to withstand jurisdictional challenge. 758 F.2d at 642-43. See also Mahiney v. Department of the Navy, 32 M.S.P.R. 432 (1987); Johnson v. Department of the Navy, 35 M.S.P.R. 236 (1987); Bibby v. Department of Transportation, 30 M.S.P.R. 507 (1986). In this case, the administrative judge's order requesting submissions on jurisdiction also failed to appraise appellant of what would be required to raise a non-frivolous allegation of jurisdiction sufficient to entitle him to a hearing on that issue. Accordingly, the administrative judge committed harmful procedural error, requiring reversal and remand to allow petitioner to present evidence and obtain a jurisdictional hearing.

However, DOJ filed a motion to deny these requests, and the administrative judge ultimately dismissed the cases on jurisdictional grounds without ruling on petitioner's Motion to Compel such discovery.

Petitioner's claim of entitlement to constitutional due process requirements is a non-frivolous allegation regarding the Board's jurisdiction. Moreover, petitioner's discovery request sought information that was essential to establishing the facts necessary to invoke the Board's jurisdiction. Accordingly, the administrative judge should have required OPM to provide responses to petitioner's discovery requests insofar as they touched upon this jurisdictional issue and should have granted petitioner a hearing on the limited issue of Board jurisdiction over his appeal.

IV. THE FACT-FINDER'S REPORT SHOULD BE ADMITTED INTO THE RECORD BECAUSE IT IS DISPOSITIVE ON THE ISSUES BEFORE THE BOARD

Under the Board's regulations, once the record closes, no additional evidence or argument will be accepted unless the party submitting the evidence shows that it was not readily available before the record closed, despite due diligence. 5 C.F.R. § 1202.114 (i); Avansino v. United States Postal Service, 3 M.S.P.B. 308 (1980). In addition, the Board will not grant a motion to reopen the record for submission of new evidence absent a showing that the new evidence is of sufficient weight to warrant an outcome different from the initial decision. Russo v. Veterans Administration, 3 M.S.P.B. 427 (1980).

In this case, to the extent that the Fact-Finder's decision may be considered evidence that is not already in the record in this case, it meets the requirements, for submission after the close of the record. The Fact-Finder's Report is attached hereto as Appendix E.

First, the Fact-Finder's Report was never considered by the administrative judge because, though submitted as a supplemental decision, it crossed in the mail with the initial decision. Due to the

timing of petitioner's receipt of the Fact-Finder's Report and the issuance of the initial decision, it was impossible for petitioner to have submitted this document in time for it to be considered by the administrative judge, even though it was submitted as soon as practicable after it was obtained from the agency.

Second, the Fact-Finder's Report should be considered by the Board because it is dispositive on the issue of whether petitioner's internship should have terminated. In the Report, Mr. Kaplan, the fact-finder, determined that the agency erroneously extended petitioner's PMI appointment for an additional year in violation of Chapter 362 of the FPM. Further, Mr. Kaplan found that based upon his satisfactory performance during the period of the PMI appointment, petitioner should have been converted to career status as of August 24, 1989.

Clearly, had the agency not acted improperly in extending petitioner's PMI appointment, he would have been converted to career status more than a year ago, and would not have been subject to termination. Thus, the Fact-Finder's Report supports petitioner's position that he had a reasonable expectation of continued employment based upon his satisfactory performance as a PMI and his right, as of August 1989, to be converted to career status.

CONCLUSION

The Merit System Protection Board Opinion and Order of February 28, 1991 erred in concluding, as a matter of law, that it had no jurisdiction to entertain petitioner's request that his termination from employment be reviewed. The administrative judge and the Merit System Protection Board erred when they found petitioner's PMI employment to have been "temporary with an expiration date of an appointment . . . specified." This erroneous finding resulted in misapplication of the law. There exist independent basis for this court to reverse the Merit System Protection Board and direct that a hearing be held to determine whether the agency's termination action comported with law and regulation and whether agency's said action is supported by substantial evidence on the record.

The law requires a hearing when there is an expectancy of continued employment. The expectancy in the case before the court is rooted in no less than Office of Personnel Management's directions and regulations, FPM Chapter 362, which requires a notice and a hearing as to whether petitioner's work performance was satisfactory, i.e. requires adverse action before termination. For the Merit System Protection Board to decide otherwise contravenes the law and the record of evidence.

Accordingly, the petitioner respectfully prays of this court that it reverse the Merit System Protection Board and direct that a hearing on the merits be held regarding petitioner's termination, by reversing the Merit System Protection Board on jurisdiction, or alternatively, reversing and remanding so that a fact-finding, evidentiary hearing be held on whether the Merit System Protection Board has jurisdiction to consider petitioner's termination, as and under the PMI program and those objectively verifiable expectancies communicated to Petitioner, or as a preference eligible combat disabled veteran.

Respectfully Submitted,

Richard C. Soehngen
Petitioner
8094 Rolling Road, Suite 100
Springfield, VA 22153
Telephone (703) 455-9615

APPENDIX B-2

October 9, 1991

United States Court of Appeals
for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, N.W.
Washington, D.C. 20439

Docket No 912-3256

Richard C. Soehngen,
Pro Se Petitioner

v.

Merit System Protection Board
Respondent

Petition for Rehearing

I, Richard C. Soehngen, Pro Se Petitioner, respectfully Petition for Rehearing of the September 26, 1991 decision and opinion affirming the MSPB's decision denying that petitioner's termination was an appealable adverse action within the Board's jurisdiction.

Petitioner respectfully submits that the Court misrepresented the facts when it concluded in it's opinion "that OPM's failure to continue his employment was an adverse action appealable to the MSPB". To the contrary, petitioner has consistently argued in his Briefs and reply letters to this Court and MSPB that it was the Department of Justice, as the direct employing agency of record for petitioner's Presidential Management Internship, that failed to convert without cause from career conditional status to a career appointment. The Court is in

error in its Decision by stating that it was OPM that did not further extend Petitioner's employment.

In short, petitioner has never asserted that it was OPM's responsibility to convert petitioner to career status as the Court's opinion states. In fact, it has been the U.S. Department of Justice (not OPM) which has been the agency of record throughout this case.

Further, the Court states in it's Decision "term appointment". The Court and the MSPB failed to take into account evidence (appointment letter and personnel actions) which specifically defines the Presidential Management Internship appointment as career conditional with no term limitations in Petitioner's tenure group. There is no statutory authority that defines Petitioner's tenure as temporary. Additionally, it is not evidenced anywhere in the record that Petitioner's appointment would expire August 24, 1990.

It is incorrect as the Court states that "It is true the OPM directions and regulations cited by Soehngen are not crystal clear in expressing their intent or application". Contrary to this assertion by the Court, Petitioner respectfully argues and submits that the applicable Department of Justice and OPM regulations (Chapter 362 of the FPM) governing the Presidential Management Internship Program are quite direct and clear by any reasonable standard regarding the stated intent of each applicable section. Regrettably, it must now be vigorously argued that it is the Court's own opinion which is not "crystal clear." Since the Court appears to be in doubt regarding the stated intent of the applicable regulations, perhaps the Court would find it instructive to reschedule a hearing and hear oral argument regarding it's apparent confusion concerning the regulation's intent.

The Court and the MSPB also substantially errs and misrepresents the Petitioner's position when it states "the interpretation urged by Soehngen would, regarding jurisdiction, treat an extension of a PMI appointment for a third year as though the extension itself created a permanent employment position." Please refer to Appendix D in Petitioner's brief, FPM Letter 362-3, Significant Changes in the Presidential Management Intern Program

as the Result of Executive order 12364, which clearly states in paragraph 10, "At the conclusion of the third year, assuming satisfactory performance, they WILL be converted to career appointments". This is a clear and precise statement. There is no record of unsatisfactory or poor performance in my three years of honorable service.

Further, according to the U.S. Code governing veterans preference, the Court and the MSPB both have failed to acknowledge the statutory right to a hearing for a 70-percent combat disabled veteran, referred to as a Special Compensatory, which establishes the right to a hearing before a termination notice can be served. Petitioner is entitled to this right. These issue are not merely technicalities. The Court should remand the case to the MSPB for a full evidentiary hearing to decide these issues fairly and impartially.

Further, the Court's Decision and Opinion is inaccurate as a matter of fact and as a matter of law. Both the Court's decision and opinion are unsupported by the substantial evidence of sworn testimony on record that was presented to the MSPB and to the Court itself. To-wit, the Fact-Finder's Report and Recommendations, Appendix E of Petitioner's Brief (over 550-pages of sworn transcript) shows conclusively:

1. The basis for Judge Robie's hasty and ill-considered request to extend Petitioner's PMI Internship for a third year in May, 1989 based on the "sudden" necessity of completion of a background investigation (BI) and need for additional training was found to be blatantly and pretextually false on both counts. The record shows that it was the U.S. Department of Justice itself that had requested Petitioner's BI be discontinued on January 13, 1988, two days after Petitioner had joined the Department. The record also shows that the Department only reopened the BI on June 28, 1990 one week after Petitioner had been notified that his PMI internship would be extended - and only after he had vigorously protested this matter directly to the agency after almost two years of employment.

Similarly, the factfinder who had been appointed by the Department of Justice, found the need for additional training to

have been blatantly pretextual and totally unpersuasive, despite the testimony of Judge Robie and Judge Mohan.

2. In addition, the factfinder found that the U.S. Department of Justice (not OPM) had violated Chapter 362 of the FPM when it had hastily requested the extension with blatantly pretextual justification and without any training plan in place for the third year as required by regulation.

Further, the fact-finder's recommendation; after three full days of sworn testimony, was that Petitioner be retroactively converted to a career service position as of August 24, 1989.

Thus, the MSPBs refusal to hold a fair and full evidentiary hearing to determine jurisdiction on these facts diligently collected in open and impartial sworn testimony represents a grievous breach of judicial review. The MSPB's failure to hold an evidentiary hearing constitutes harmful reversible error which the Court should not now ignore.

Respectfully, Petitioner prays that the Court will now recognize that it has relied on incomplete eveidence (or failed review all evidence presented and not addressed the legal significance of the controlling regulations (Chapter 362 of the FMP which oversee Executive Order 12364) or checked for legal or factual accuracy in rendering it's initial opinion and decision.

Therefore, Petitioner respectfully requests the Court will remand this case to the MSPB for a hearing regarding the significant jurisdictional issues involved.

Respectfully,

Richard C. Soehngen,
Petitioner Pro Se

CERTIFICATE OF SERVICE

I certify that this Petition for Rehearing was sent today by Regular

First Class Mail to:

Anitia Marshall
Merit System Protection Board
1120 Vermont Avenue, NW
Suite 816
Washington, D.C. 20419

Mary B. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718
P.O. box 883
Washington, D.C. 20044

Dated October 9, 1991

Richard C. Soehngen
Petitioner
Suite 100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-3256

RICHARD C. SOEHNGEN,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: September 26, 1991

Before ARCHER, MICHEL, and PLAGER, Circuit Judges.

PER CURIAM.

DECISION

Richard C. Soehngen received a two year Presidential Management Intern (PMI) appointment. His appointment was later extended one year. When the appointment expired, the Office of Personnel Management (OPM) did not further extend Soehngen's employment. Soehngen appealed to the Merit Systems Protection Board (MSPB or Board). The MSPB concluded that the decision to allow a term appointment to expire was not an appealable adverse action within the Board's jurisdiction. We affirm.

OPINION

Soehngen argues that he had a reasonable expectation of continued employment, beyond the termination date of his PMI appointment. Soehngen concludes that OPM's failure to continue his employment was an adverse action appealable to the MSPB.

It is true that the OPM directions and regulations cited by Soehngen are not crystal clear in expressing their intent or application. However, the interpretation urged by Soehngen would, regarding MSPB jurisdiction, treat an extension of a PMI appointment for a third year as though the extension itself created a permanent employment position. The record demonstrates that the MSPB has consistently rejected this argument. See also 5 U.S.C. § 7512 (1988); 5 C.F.R. § 752.401(b) (11) (1991).

The legal standard by which the Federal Circuit reviews decisions of the MSPB is that a decision must be affirmed unless it is found to be:

1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

2) obtained without procedures required by law, rule or regulation having been followed; or

3) unsupported by substantial evidence.

See 5 U.S.C. § 7703. In light of this standard of review and of the facts in this case, we have no doubt that the Board's decision must be and is hereby affirmed.

91-3256

APPENDIX C

United States Court of Appeals for the Federal Circuit

91-3256

RICHARD C. SOEHNGEN,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

ORDER

ORDER

Before ARCHER, Circuit Judge, MICHEL, Circuit Judge, and PLAGER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The mandate will issue on October 31, 1991.

FOR THE COURT,

Dated: October 24, 191

Francis X. Gindhart
Clerk

cc: RICHARD C. SOEHNGEN
ANITA MARSHALL

SOEHNGEN V MSPB, 91-3256
(MSPB - CD7529010604)

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Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

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APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC07529010604

RICHARD C. SOEHNGEN,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: FEB. 28, 1991

Steven L. Murray, Neill, Mullenholz & Shaw, Washington, D.C., for the appellant.

Mary E. Magee, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the October 16, 1990 initial decision that dismissed his petition for appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.117, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

The appellant filed a timely petition for appeal, alleging that the August 24, 1990 expiration of his appointment as a GS-11 Presidential Management Intern (PMI), Executive Office for Immigration Review, Office of the Chief Immigration Judge, constituted retaliation for his having engaged in whistleblowing activities, and that it therefore violated 5 U.S.C. § 2302(b) (8). The administrative judge issued an initial decision in which she found that the appellant served in a temporary appointment that expired in accordance with its scheduled termination date. She then ruled that, in cases where an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board.

Further, the administrative judge found that the Board lacked jurisdiction to consider the appellant's claim of retaliation for alleged whistleblower activity as an affirmative defense because it was not raised in connection with an otherwise appealable action, and that it lacked jurisdiction to consider claim as an individual right of action appeal under the Whistleblower Protection Act of 1989 because the appellant had not show that he first sought corrective action from the Special Counsel regarding the matter. See 5 U.S.C. §§ 1214 (a) (3), 1221 (a); 5 C.F.R.§ 1209.2 (b)

(1).[11] The administrative judge therefor dismissed the appeal for lack of jurisdiction.

The appellant has filed a timely petition for review, asserting that the administrative judge erred by dismissing his appeal on jurisdictional grounds. In addition, the appellant has submitted alleged "new and material evidence" that he claims is dispositive of the issue before the Board. See 5 C.F.R. § 1201.115. The agency has timely responded in opposition to the petition for review.

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[11] On July 6, 1989, the Board republished its entire regulations on and interim basis, 54 Fed. Reg. 28,632 (1989) and on December 29, 1989, it republished part 1201 of those regulations on a final basis, 54 Fed. Reg. 53,500 (1989). See also 55 Fed. Red. 548 (1990) (correcting errors in publication of part 1201). For ease of references, we refer in this Opinion to the Board's regulations at 5 C.F.R. parts 1201 and 1209. For regulations relating specifically to the Whistleblower Protection Act of 1989, however, the parties must refer to 54 Fed. Reg. 28,632 (1989), 54 Fed. Reg. 53,500 (1989), and 55 Fed. Reg. 548 (1990). They also should refer to those sources for the precise text of other Board regulations.

ANALYSIS

Chapter 362 of the Federal Personnel Manual (FM) provides that PMI appointments, such as the one at issue her, are not to exceed 2 years unless they are extended by the Office of Personnel Management (OPM) for 1 additional year. See Appeal File (AF), Vol. 1 Tab 1, Attach. 1 a. It is undisputed that the appellant served for 2 years in his PMI appointment, that the agency then sought and obtained OPM's permission for a 1-year extension, and that the appellant's appointment expired, as scheduled, at the end of the third year. As the administrative judge correctly stated, "when an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board." Initial Decision 3. *See Berger V. Department of Commerce, 3 M.S.P.R. 198,199-200 (1980).*

The appellant argues in his petition for review that the administrative judge erred by rejecting his claim below that: (1) He was subjected to a removal action, and was thus entitled to the adverse action procedures of Chapter 75, Title 5, United States Code; and (2) he had a reasonable expectation of continued employment, and was thus entitled to procedural due process upon the termination of his appointment. We find that the administrative judge thoroughly adjudicated these issues below, that the appellant's repeated arguments constitute his mere disagreement with her findings and conclusions, and they do not warrant Board review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-43 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The appellant also argues that the administrative judge erred by denying his request for a hearing. There is no statutory requirement that the Board hold a hearing on the threshold issue of jurisdiction. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427 (FEd. Cir. 1984). The statutory provision concerning hearings on appeals to the Board, 5 U.S.C. § 7701 (a), provides a right to a hearing on the merits, but only after jurisdiction has been properly invoked. It is appropriate for the

Board to hold a hearing where the appellant's allegations raise non-frivolous issued of fact relating to jurisdiction that cannot be resolved simply on the basis of documentary evidence. Id. at 1427028. In the present case, the appellant did not raise a non-frivolous claim of jurisdiction.[12]

Accordingly, we find that the administrative judge did not err denying the appellant's request for a hearing on the issue of jurisdiction over the appeal.[13] *See O'Neal v. United States Postal Service*, 39 M.S.P.R. 645, 649 (1989).

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[12] The appellant also alleges that the administrative judge erred, under *Burgess v. Merit Systems Protection Board*, 758 F.2d 641,643 (Fed. Cir. 1985), by failing to give him adequate notice of what was required to establish Board jurisdiction. There is no merit to this contention. The order acknowledging the appellant's petition for appeal specifically informed the appellant that jurisdiction was questionable because he was seeking to challenge the expiration of a temporary appointment. Appeal File (AF), Vol 1, Tab 2. The appellant addressed this very issue in his 8-page response brief, *id.*, Tab 3, and he has added nothing substantive, in his petition for review, to the legal arguments he presented on that issue below. Petition for Review File, Tab 1.

[13] The appellant also argues that the administrative judge erred by failing to rule on his motion to compel discovery from OPM, a nonparty, regarding the number of PMI appointments that were converted to career appointments or were terminated since September 1980. AF, Vol. 1, Tab 8. Inasmuch as the appellant's own PMI was not converted to a career appointment, but remained temporary until it expired, the appellant's discovery request did not cover evidence material to this appeal. Thus the administrative judge's failure to rule on his motion to compel had no effect on his substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Finally, the appellant has resubmitted a copy of the October 2, 1990 Fact-Finder's Report and Recommendations (Report) that the agency issued in his favor, pursuant to a grievance he had filed to contest the agency's extension of his PMI appointment for a third year. Petition for Review File, Tab 1, Ex. A. The appellant hand-carried this document to the administrative judge below on October 16, 1990, subsequent to the September 25, 1990 close of record on the issue of jurisdiction. *See AF*, Vol. 2, Tabs 2, 10. The administrative judge issue her initial decision that same day, however, and evidently did not consider the Report. *See* AF, Vol. 2, Tabs 9.

The Report addresses the issues of whether the agency violated Chapter 362 of the FPM and/or committed reprisal for the appellant's filing of a grievance when it extended his PMI appointment for a third year. [14] At issue in this appeal, however, is whether the agency's action in releasing the appellant from employment upon the termination of his temporary PMI appointment is an action that is appealable to the Board. We therefore find the Report does not warrant an outcome different from that of the initial decision, and that it accordingly is not "material. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345,349 (1989). In light of this finding, we need not determine whether the Report is "new." *See* 5 C.F.R. § 1201.115; *Avansino v. United States Postal Service, 3 M.S.P.R. 211, 214 (1980). (the Board will not consider evidence submitted for the first time with*

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[14] The Report's recommended findings are that the agency did violate Chapter 362, but did not commit reprisal, when it extended the appellant's PMI appointment. As relief, the Report recommends that the appellant be retroactively converted to a permanent civil service career position, effective August 24, 1989. Petition for Review File, Tab 1, Ex. 1. The Board, however, has not been presented with an appeal from an action removing the appellant from such a position.

the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal, *See* 5 C.F.R. § 1201.113(3).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* U.S.C. § 7703 (a) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs firs. *See* 5 U.S.C. § 7703 (b) (1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

WASHINGTON, D.C.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD C. SOEHNGEN, Appellant,	DOCKET NUMBER DC07529010604
v.	
U.S. DEPARTMENT OF JUSTICE, Agency.	

APPELLANT'S SUBMISSION ON THE ISSUE OF JURISDICTION

INTRODUCTION

Appellant, Richard C. Soehngen, by and through his counsel, Neill, Mullenholz & Shaw, hereby submits this Submission on the Issue of Jurisdiction, pursuant to the Acknowledgement Order, issue on August 31, 1990.

SUMMARY OF FACTS

Mr. Soehngen entered the Presidential Management Intern (PMI) program on August 24, 1987, as a program analyst in the Military Traffic Management Command in Falls, Church, Virginia. This position was in the Department of Army. As a result of Mr.

Soehngen's competitive entry into the PMI program on August 24, 1987, his conversion date to the civil service was August 24, 1989.

Mr. Soehngen served in the initial position from approximately August 24, 1987 through January 11, 1989. At that time, Mr. Soehngen transferred to the U.S. Department of Justice (DOJ) to assume a position as management officer. Mr. Soehngen occupied the position of management officer in the agency from January 11, through July 31, 1988.

In a letter from Judge William R. Robie, Chief Immigration Judge in the Executive Office for Immigration Review, DOJ, from Mr. Soehngen, dates June 10, 1988, Mr. Soehngen was offered the position of program analyst in the Criminal Alien Unit (CAU) of the Office of Chief Immigration Judge (Attachment 3).[1] Upon entry into the program, Mr. Soehngen's grade level was GS-9. Within approximately two weeks after assuming the position in August 1988, Mr. Soehngen was promoted to the GS-11 level.

In a letter, dated May 23, 1989, from Warren Oser, Director of Personnel, DOJ, to Ms. Patricia Paige, Chief, Programs Division, Office of Personnel Management, the agency requested OPM's official approval of the agency's extension of Mr. Soehngen's PMI for a third year (Attachment 7). In response to the May 23, 1989 letter, Ms. Paige submitted a letter to Mr. Oser, dated May 26, 1989, approving the agency's request for an extension of Mr. Soehngen's PMI internship into a third year (Attachment 8).

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[1] On August 24, 1990, Mr. Soehngen filed his initial request for stay. A copy of the request for stay was filed in conjunction with the appeal at issue on August 28, 1990. The request for stay and the attachments filed in conjunction with the stay request were incorporated in the appeal and are incorporated and referenced herein this submission. The references to "Attachments" herein refer to the attachments filed in conjunction with the stay request. The references to "Exhibits" herein refer to the documents attached to this pleading.

At the time of the personnel action at issue, Mr. Soehngen was a program analyst in the CAU in the Office of Chief Immigration Judge, in DOJ. He was employed in the Presidential Management Intern (PMI) program. On August 14, 1990, Mr. Soehngen received a request for personnel action notifying him of the "termination-expiration of appointment" concerning his PMI ("personnel action"). The effective date of the termination-expiration of appointment was August 24, 1990. The request for personnel action constitutes both the notice and decision of the termination at issue (Attachment 1). Mr. Soehngen filed his appeal with the Board on August 28, 1990.

ARGUMENT

A. Mr. Soehngen Has Appeal Rights.

The Board has jurisdiction to accept and decide Mr. Soehngen's appeal. Mr. Soehngen satisfies the statutory definition of an "employee" under 5 U.S.C. § 7511 (a)(1)(B). He is a preference eligible employee who completed one year of current continual service in the same of similar position. Mr. Soehngen is also a preference eligible compensatory disabled veteran, defined as a special disabled veteran under 38 U.S.C. § 2011. Furthermore, Mr. Soehngen's appeal is supported by 5 C.F.R. § 720.301 (1990) (Disabled Veterans Affirmative Action Program), and 38 U.S.C. § 2014, providing that the policy of the United States is to promote the maximum of employment and job advancement opportunities within the federal government for qualified disabled veterans and veterans of the Vietnam era.

Mr. Soehngen has been the subject of an adverse action. Mr. Soehngen's termination is essentially a removal under 5 U.S.C. § 7512 and such an action is appealable to the Board.

The Federal Personnel Manual (FPM) concerning the Presidential Management Intern (PMI) program provides in Chapter 362, Section 2-8, that the employing agency may convert the intern to the competitive service or extend the internship with prior approval from OPM. If neither of these actions is taken, the PMI appointment terminates. For preference eligible employees, as

defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements relating to adverse actions provided at 5 U.S.C. § 7513. Furthermore, Section 2-8 of Chapter 362 of the FPM provides that an agency may not remove an intern based on a prohibited personnel practice listed in 5 U.S.C. §2302(b) Attachment 1a).

The Board in Shelton v. Federal Deposit Insurance Corporation, 38 M.S.P.R. 303 (1988), held that separation of an employee in the temporary excepted service, which occurred when the agency allowed the temporary appointment to expire on its expiration date, was not a removal entitling the employee to appeal rights, even though the employee was a preference eligible employee. Mr. Soehngen's present action is distinguishable from Shelton because Mr. Soehngen's had a clear expectation of continued employment in the PMI program.

FPM 362 provides that PMI interns have an expectation of continued employment. Chapter 362 provides that an employee has an expectation of conversion as long as the employee has performed satisfactorily in the agency. See FPM Chapter 362, Sections 2-7 and 2-8. In addition, section 2-8 of FPM Chapter 362 provides that the termination actions shall be consistent with the objectives of the PMI program to select, develop, and retain for the federal service outstanding employees for careers in public sector management, and that terminations must be preceded by a full and careful review process. Furthermore, Section 2-8 of FPM Chapter 362 provides that for preference eligible employees, removal at 5 U.S.C. § 7513 (Attachment 1a).

In a letter to Mr. Soehngen, dated June 10, 1988, in which Judge Robie offered Mr. Soehngen's the position of program analyst in the CAU of the Office of Chief Immigration Judge, Judge Robie stated: "You can expect to be promoted to GS-11/1 when you become eligible (PMI entry date on duty date, August 23, 1987). Longer term career development potential to the GS-12 (at internship conclusion) and GS-13 levels based on job performance are associated with this position at OCIJ" (Attachment 3). This letter establishes the expectation that Mr. Soehngen would

have continued employment in the PMI program as long as his performance was successful.

Mr. Soehngen had a reasonable expectation of continued employment because the agency approved a performance work plan for Mr. Soehngen on June 20, 1990 (Exhibit 1). This plan covered the period of June 20, 1990 through March 31, 1991. Moreover, in February 1990, the agency approved nine training courses for Mr. Soehngen to attend (Exhibit 2a). In the period of February to August 1990, Mr. Soehngen successfully completed seven of the nine courses, the two remaining courses were canceled by the OPM. In fact, Mr. Soehngen completed his last training course on August 22, 1990, subsequent to the date, August 14, 1990, on which he was advised of the personnel action at issue (See, Exhibit 2 - Mr. Soehngen's Synopsis of Training).

It is unreasonable to conclude that Mr. Soehngen was in a temporary position when he provided services to the agency under a performance work plan and training schedule which remained in effect past the period of time on which he was advised of his termination. Furthermore, it is unreasonable to conclude that Mr. Soehngen was a temporary employee in light of the fact that the agency provided Mr. Soehngen with such a significant degree of training.

Throughout Mr. Soehngen's service in the PMI program, his performance has been found to be fully successful by agency officials. Since 1988 until his termination, Mr. Soehngen's direct supervisor has been Assistant Chief Immigration Judge Mary Ann Mohan. Mr. Soehngen's first discussion with Judge Mohan regarding a performance review was January 1989. In this mid-term performance appraisal, Judge Mohan stated to Mr. Soehngen that he had received an excellent or an outstanding rating. Thereafter, on April 25, 1989, Judge Robie provided Mr. Soehngen with a letter of recommendation for law school (Attachment 4). Shortly thereafter, on May 3, 1989, Mr. Soehngen received a formal performance rating for the rating period of September 1, 1988 through March 31, 1989 (Attachment 5). Judge Mohan signed this document on April 25, 1989, as a rating official and

Judge Robie signed this document on April 26, 1989, as a reviewing official. Mr. Soehngen's rating was fully successful.

The permanent nature of Mr. Soehngen's appointment is also established by the request for personnel action forms admitting Mr. Soehngen to the PMI program and the request for personnel action reflection his initial employment with the Department of Justice. On both forms, the code under block 18-A, NOAC, is #170. Upon information and belief, this code reflects a permanent appointment pursuant to Department of Justice Personnel Guide to Processing Action, FPM Supplement 296-33, Chapter 11. Moreover, this coding is consistent with FPM Chapter 362. Furthermore, on both requests, there is no reference to any "not to exceed" date in block 18-8, reflecting the nature of appointment (Attachments 1b and 1c).

On the request for personnel action hiring Mr. Soehngen into the PMI program in August 1987 (Attachment 1b) and the notification of personnel action indicating Mr. Soehngen's hire into the Executive Office for Immigration Review (Attachment 1c), it is indicated that Mr. Soehngen's tenure status is that of Group 2 (See, Block No. 7 on Attachments 1b and 1c). **Group 2 is defined to include those employees who serve "under conditional appointments which automatically lead to full tenure after a prescribed time and without further qualification" (Exhibit 3, second side - attached to this pleading).**

B. Agency Committed Harmful Reversible Error.

As set forth above, in FPM Chapter 363, Mr. Soehngen has appeal rights as a preference eligible for the adverse action at issue. In Blalock v. Dept. of Agriculture, 28 M.S.P.R. 17 (1985), the Board held that preference eligible employees have a right to appeal from removal and that the absence of the procedures required by 5 U.S.C. § 7513 constitutes harmful error necessitating reversal of the action under 5 U.S.C. § 7701 (c) (2) (A). Therefore, Mr. Soehngen is entitled to be provided with the procedures required by 5 U.S.C. § 7513. The agency's failure to provide such procedures constitutes reversible error.

CONCLUSION

The for reason set forth herein, Mr. Soehngen has appeal rights to the Board and the Board has appropriate jurisdiction over this appeal.

Respectfully submitted,

William L. Bransford
Steven L. Murray
Neill, Mullenholz and Shaw
815 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 463-8400